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January 24, 2024

Mr. David J. Smith, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Kenneth Smith v. Comm'r, Ala. Dep't of Corrections, et al.*, No. 24-10095

Dear Mr. Smith:

Appellees write to inform the Court that, earlier today, the Supreme Court denied certiorari in Kenneth Smith's other pending case, an appeal of the state court's decision to deny his second petition for postconviction relief. *See Smith v. Alabama*, Nos. 23-6517 & 23A664.

That is important because Smith's Equal Protection Claim in this case turned on allegations that executing Smith "despite Mr. Smith's *pending* appeal from the dismissal of the State Court Petition" would deny him equal protection. *See, e.g.*, DE31:¶58 (emphasis added). For that claim, Smith sought "[a] declaration that attempting to execute Mr. Smith by nitrogen hypoxia before he has exhausted his pending appeals would violate his right to equal protection under the laws under the Fourteenth Amendment to the U.S. Constitution," and "[a] preliminary and permanent injunction prohibiting Defendants from executing Mr. Smith by nitrogen hypoxia until he has exhausted his pending appeals or, alternatively, a stay of execution pending completion of Mr. Smith's appeals." DE31:34.

With the Supreme Court's order today, Mr. Smith's appeals have now ended. Thus, "it is utterly unnecessary to take up the question" whether his equal protection rights would have been violated by executing him while his state court appeal is pending. *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1339 (11th Cir. 2001). Indeed, "Article III unambiguously forbids [the Court] from considering the question in the absence of a live dispute." *Id.* Even if this Court accepts every argument Smith pressed on appeal, it is no longer the case that he will be executed "while his Rule

32 action based on the failed execution attempt in November 2022 remains unexhausted.” Doc. 15 at 16. His claim, therefore, is moot and his request for a stay on that claim should be denied for this additional reason.

Respectfully submitted,

s/ Edmund G. LaCour Jr.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on January 24, 2024, using the CM/ECF Document Filing System, which will send notification of such filing to all noticed parties.

s/ Edmund G. LaCour Jr.

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